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Sands Bethworks Gaming, LLC d/b/a Sands Casino Resort Bethlehem and Law Enforcement Employees Benevolent Association. Cases 04–CA–076289 and 04–RC–021833

November 12, 2014

DECISION, CERTIFICATION OF
REPRESENTATIVE, AND NOTICE TO
SHOW CAUSE

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND JOHNSON

On May 30, 2012, the National Labor Relations Board issued a Decision and Order in this proceeding, which is reported at 358 NLRB No. 49. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the General Counsel filed a cross-application for enforcement.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals remanded this case for further proceedings consistent with the Supreme Court's decision.

The National Labor Relations Board has consolidated the underlying representation proceeding with this unfair labor practice proceeding and has delegated its authority in both proceedings to a three-member panel.

This is a refusal-to-bargain case in which the Respondent is contesting the Union's February 10, 2012 certification as bargaining representative in the underlying representation proceeding. The Board's May 30, 2012 decision states that the Respondent is precluded from litigating any representation issues because, in relevant part, they were or could have been litigated in the prior representation proceedings. The 2012 representation proceeding, however, also occurred at a time when the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm, and we do not give it preclusive effect. Accordingly, we consider below the representation issues from the 2012 proceeding that the Respondent has raised in this proceeding.

In its response to the Notice to Show Cause, the Respondent reiterates its objections to the election alleging

(1) that the Petitioner is disqualified from representing a unit of security guards because it is indirectly affiliated with a union representing nonguard employees, and (2) that the Petitioner provided employees with valuable gifts during the preelection campaign to influence the outcome of the election.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the Respondent's objections to the election held July 21, 2011, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The corrected tally of ballots shows 51 for and 35 against the Petitioner, with no challenged ballots.

The Board has reviewed the hearing officer's report and the record in light of the exceptions and briefs. We have also considered the Decision and Certification of Representative issued on February 10, 2012, and we agree with the rationale set forth therein. Accordingly, we adopt the hearing officer's findings and recommendations to the extent and for the reasons set forth in the February 10, 2012 Decision and Certification of Representative, which is incorporated herein by reference, and we find that a certification of representative should be issued.¹

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Law Enforcement Employees Benevolent

¹ Member Johnson concurs with his colleagues that there is no basis in the record for reversing the hearing officer's credibility findings. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). He also agrees that the hearing officer properly rejected the Employer's proffer of evidence regarding the Petitioner's alleged affiliation with another union. This issue was fully litigated in a preelection hearing, and the Board, in an unpublished order issued July 20, 2011, denied the Employer's request for review of the Regional Director's decision. Moreover, the Regional Director granted the Employer's request for special permission to appeal the hearing officer's ruling, and denied the appeal on the merits. The Employer's assertion that it has been denied its procedural right to properly and fully litigate this matter is thus without basis. In any case, Member Johnson agrees with his colleagues that the rejected evidence would not have established that the Petitioner was disqualified from representing a unit of guards under Sec. 9(b)(3), because the proffered evidence, taken in the light most favorable to the Employer, would not establish that the Petitioner "lack[ed] freedom and independence in formulating its own policies and deciding its own course of action." *Wells Fargo Guard Services*, 236 NLRB 1196, 1197 (1978) (quoting *Magnavox Co.*, 97 NLRB 1111, 1113 (1952)).

Member Johnson also agrees to adopt the hearing officer's recommendation to overrule the Employer's Objection 3, because, taking the facts as alleged by the Employer, at most three employees in a unit of 92 received benefits from the union (two baseball tickets and the election observer's dinner), while the Petitioner prevailed in the election by 16 votes. The Petitioner's alleged conduct here falls within a range that the Board has found does not require setting aside the results of an election. See *Lamar Advertising of Janesville*, 340 NLRB 979 (2003).

Association, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time security guards employed by the Employer at its 77 Sands Boulevard facility, excluding the locksmith, all other employees, and supervisors as defined in the Act.

NOTICE TO SHOW CAUSE

As noted above, the Respondent has refused to bargain for the purpose of testing the validity of the certification of representative in the U.S. Courts of Appeals. Although the Respondent's legal position may remain unchanged, it is possible that the Respondent has or intends to commence bargaining at this time. It is also possible that other events may have occurred during the pendency of this litigation that the parties may wish to bring to our attention.

Having duly considered the matter,

The General Counsel is granted leave to amend the complaint on or before November 24, 2014, to conform with the current state of the evidence.

The Respondent's answer to the amended complaint is due on or before December 8, 2014.

NOTICE IS HEREBY GIVEN that cause be shown, in writing, on or before December 29, 2014 (with affidavit of service on the parties to this proceeding), as to why the Board should not grant the General Counsel's motion for summary judgment. Any briefs or statements in support of the motion shall be filed by the same date.

Dated, Washington, D.C. November 12, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD